IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.657 OF 1989

1. Sahebrao Mahadeo Bagal
age 60, Occ: Agriculturist ..
2. Sadashiv Sahebrao Bagal
age 21, Occ: Agriculturist ..
3. Vijay Sahebrao Bagal
age 18, Occ: Agriculturist ..
4. Nandkumar Sahebrao Bagal
age 15, Occ: Agriculturist ..
5. Dilip Sahebrao Bagal
age 14, Occ: Agriculturist ..
6. Dnyandeo Sahebrao Bagal
age 10, Occ: Agriculturist
Nos.4 to 6 G.A.L. No.1,
All residing at Gove, Tal.Satara .. Appellants.

Vs.

1. Sarjerao Mahadeo Bagal
age 43, Occ: Agriculturist ..
2. Bajirao Mahadeo Bagal
age 60, Occ: Agriculturist ..
3. Muktabai Mahadeo Bagal
age 80, Occ: Household
All residing at Gove, Tal.Satara .. Respondents.

Mr.Uday Warunjikar for the appellants.
Mr.Prathamesh Bhorgude i/b Mr.A.V.Anturkar for respondent no.2.

CORAM : D.B.BHOSALE, J.
DATED : 28TH FEBRUARY, 2007

ORAL JUDGMENT:

. This second appeal is directed against the concurrent judgments of the courts below by which a suit filed by the respondent-plaintiff for partition and separate possession of his 1/4th share in ancestral coparcenary properties of the joint family consisting of the plaintiffs and the defendants stands

decreed.

2. The factual matrix to the extent as may be relevant and necessary for adjudication of the questions raised in the appeal is as follows: The plaintiff - Sarjerao, defendant no.1 - Sahebrao and defendant no.2 - Bajirao are the sons of deceased - Mahadeo and his wife defendant no.3 - Muktabai. Defendant no.4 to 8 are the sons of Sahebrao. Admittedly, the family has landed properties at Gove, Vangal and Malgaon in Satara District. In the first paragraph of the plaint a detailed description of the properties at all the three places is given by the plaintiff. Mr.Warunjikar, learned counsel for the appellants, on instructions, confined the challenge only in respect of the following properties, which are described in paragraph 1(b) of the plaint, that is, Gat No.238/1 admeasuring 1 hectare 38 Ares, Gat No.238/2 admeasuring 1 hectare 23 Ares, Gat No.238/3 admeasuring 5 Ares and Gat No.238/4 admeasuring 83 Ares (for short "the lands in dispute") situate at Vangal, District Satara and the fixed deposit of Rs.25,000/- in Janata Co-operative Bank Ltd., Satara, which is the amount, deposited by the appellants, out of the income derived from the lands in dispute. These lands according to appellant no.1 are his self acquired properties purchased by him under section

32-G of the Bombay Tenancy and Agricultural Lands Act (for short "Tenancy Act"). They were in his separate possession. As against this, according to the respondent-plaintiffs, the proceedings under section 32-G in respect of the lands in dispute and the certificate under section 32-M issued as a consequence thereof was in favour of all the three brothers, namely, Sarjerao, Sahebrao and Bajirao and, therefore, it cannot be treated as self acquired property of the appellant - defendant no.1. Insofar as other properties are concerned, since no dispute is raised about the findings recorded by the courts below in respect thereof a decree to that extent stands confirmed. In other words the other properties are held to be joint family properties and are liable to be partitioned as per the impugned order.

3. Mr.Warunjikar, learned counsel for the appellants basically raised the following question for my consideration: "Whether the courts below have committed jurisdictional error while dealing with the case of the appellants that the appellant-defendant no.1 alone was the tenant in the suit lands and he became deemed purchaser under section 32-G and that the certificate under section 32-M of the Tenancy Act was issued in his name alone and that the joint family has no concern with those lands and, therefore, they

were not liable to be partitioned ?" and further, the reference under section 85 of the Tenancy Act was necessary ? Mr.Warunjikar did not raise any other question of law. He submitted that initially 32-M certificate was issued only in favour of appellant no.1 and later on the application was made by other brothers, namely, Sarjerao and Bajirao, for entering their names in the said certificate. He submitted that 32-M certificate is a conclusive proof of the appellants' tenancy in whose favour only the certificate was issued. In support of this submission he placed heavy reliance upon the judgment of Gujarat High court in **Shankerbai & Anr. Vs. Dagdubai Govindbhai & Ors. 1992 (1) Gujarat Law Reporter 157**. He further submitted that in the 7 X 12 extracts which were produced on record, reflected the name of appellant no.1 alone. The notice issued by the Land Acquisition Officer in respect of one of the lands in dispute was also in the name of the appellant alone. Similarly, in the oral evidence, according to Mr.Warunjikar, it has come on record that there is no document to show that all the three brothers were cultivating the said land. He then submitted that in view of a specific foundation led by the defendants in the written statement that the suit properties are not the ancestral properties but self acquired properties of the appellant - defendant no.1, the trial Court

ought to have framed issue of tenancy and referred it to the Tenancy Authorities under section 85 of the Tenancy Act since the civil court has no jurisdiction to record its findings in respect thereof. In support of this contention he also invited my attention to few documents and more particularly the documents at Exhibits-104, 105, 125, 136, 137 and 138 to contend that all these documents clearly support the appellant's case that the lands in dispute are his self acquired properties and that the joint family has no concern with the same. He also invited my attention to the relevant portion in the evidence of almost all the witnesses in support of this submission.

4. As against this Mr.Bhorgude, learned counsel for respondent no.2 at the outset submitted that 32-M certificate, as argued by Mr.Warunjikar was initially issued only in favour of defendant no.1, is factually incorrect. He invited my attention to the observations made by the courts below as also the 32-M certificates (Exhibits 136 to 138) to contend that they were issued in favour of all the three brothers. Issuance of certificates in favour of other brothers was never objected to or challenged by defendant no.1. That apart the question raised by Mr.Warunjikar was not raised before the Court below seeking reference

under section 85 of the Tenancy Act, and, therefore, this question cannot be raised in the second appeal. He submitted that the defendants did not adduce any evidence in support of their case and in view thereof the courts below have rightly decreed the suit filed by the plaintiff for partition and separate possession of the lands in dispute.

5. It is revealed from the record that the lands in dispute originally belonged to Tryambak Gokhale. From Gokhale they were transferred to Barge and from Barge they were obtained on lease by Sahebrao - defendant no.1 in the year 1952-53. The lease was admittedly created in favour of defendant no.1 in 1953. Since the tenancy was created prior to the tiller’s day, according to defendant no.1, the purchase price under section 32-G of the Tenancy Act was fixed and 32-M certificate was issued in "his favour alone" in respect of the lands in dispute. Admittedly, the family consisting of the plaintiff and defendants was joint when the lands in dispute were taken on lease. It is true that the lands in dispute were standing in the name of defendant no.1 alone and in 1980 the plaintiff and defendant no.2 applied before the Revenue authorities and got their names entered in the record of rights. On the basis of these facts, defendant no.1 claims that he alone was

the tenant in the lands in dispute. As against this the plaintiffs have brought sufficient material on record to show, as also considered by the courts below, that defendant no.1 being the eldest in the family, their father had taken the lease on his name. The landlord was examined by the plaintiff, who supports the contention that defendant no.1 was inducted in the lands in dispute on behalf of the joint family and all the brothers used to cultivate it jointly. Defendant no.1 has not stepped into witness box at all and only chose to cross examine the witnesses examined by the plaintiff. The plaintiff himself and all the witnesses have specifically stated in their evidence that the tenancy rights were acquired by the family and not by defendant no.1 alone. The evidence of all the witnesses have been considered by the courts below in proper perspective and I find no reason to interfere with the findings of fact holding that the lands in dispute also belonged to the joint family. The document at Exhibit 105, namely, receipt issued by the original landlord in favour of defendant no.1 also refer to 1/3rd share of defendant no.1. On the basis of this document, to which my attention was drawn by Mr.Warunjikar, it cannot be said that he alone is the owner of the lands in dispute. The document at Exhibit-134 also is of no avail to the appellant to contend that he alone is the

owner of the lands in dispute. As a matter of fact the mutation entry no.684 clearly shows that the names of all the three brothers were entered in the record of rights. All this has been appreciated by the courts below in proper perspective and having regard thereto have recorded concurrent findings and I do not find any reason to interfere with the same.

6. That takes me to deal with the next submission of Mr.Warunjikar, learned counsel for the appellant. In the memo of the appeal the question of law is formulated in the following terms, as ground no.11 :

> "(11) The proceedings under section 32G of the Tenancy Act, payment of purchase price by defendant no.1 alone, **32 M certificate issued in the name of defendant no.1 alone** conclusively established that defendant no.1 was a tenant in respect of lands S.Nos.238/1 to 4 in his individual capacity."
>
> (emphasis supplied)

. A plain reading of the aforesaid ground no.11 shows that the case set up by the appellants-defendants is founded on 32-M certificate which allegedly was issued in the name of defendant no.1 alone. Even, Mr.Warunjikar, learned counsel for the appellant initially argued that 32-M certificate was issued in the name of defendant no.1 alone. However, when it was revealed, in the course of hearing, that 32-M certificates were issued in favour

of all the three brothers, he submitted that their names were entered in the certificate subsequently. In view of this submission I repeatedly asked Mr.Warunjikar as to what is the basis for contending that initially 32-M certificate was issued only in the name of defendant no.1. After taking me through the pleadings, the judgments of the courts below, the evidence of all the witnesses and other documents he ultimately submitted that 32-M certificate which, according to him, was initially issued in favour of defendant no.1 alone, was not placed on record and he fairly stated that there is no direct reference to the said certificate anywhere in the record. However, he invited my attention to paragraphs 13 and 17 of the appeal court's judgment to contend that there is an indirect reference made to the original certificate issued in favour of defendant no.1 alone in respect of the lands in dispute. The relevant portion in paragraph 13 and 17 reads thus:

> "13. ....
> The Plaintiff and Defendant No.2 for the first time after 1980 applied before the Revenue Authorities to get their names entered and they even succeeded in it, The certificate issued under Sec.32-M of the Tenancy Act, is in the name of 3 brothers.
> 17. ....
> Once the name of Sahebrao has been entered into the Revenue records as tenant, the further entries and the further proceedings even of price fixation are consequential."

. According to Mr.Warunjikar, the aforesaid

observations and the case set up by the defendants in the written statement as also the case put to the witnesses in the course of cross examination together clearly indicate that there was 32-M certificate initially issued "only" in the name of defendant no.1. The question of law formulated by Mr.Warunjikar, in my opinion, is based upon a wrong and incorrect factual premise that 32-M certificate was issued in the name of defendant no.1 alone.

7. Mr.Warunjikar's submission that subsequently the other brothers got their names entered in the record of rights and in the certificate under section 32-M of the Tenancy Act and on the basis thereof started claiming tenancy rights in the property and, therefore, the courts below ought to have framed an issue regarding tenancy and referred it to the tenancy authorities under section 85 of the said Act also deserves to be rejected. He submitted that a member of the family could be a tenant in his individual capacity and merely because he is a member of the joint family does not mean that other members of family are joint tenants. This submission also deserves to be rejected outright in view of the fact, the very foundation of the submission that 32-M certificate was initially issued in the name of defendant no.1 alone is not correct. Even if this

submission is accepted the fact remains that the three 32-M certificates were issued in the name of all the three brothers and these are the only certificates produced on record (Exhibits-136 to 138 dated 28.7.1986). At no stage in the proceedings defendant no.1 has explained issuance of the certificates in favour of his brothers. In the face of these certificates the issue was neither raised before the Courts below nor it is involved in this appeal. The judgment relied upon by Mr.Warunjikar in the peculiar facts and circumstances of this case is of no avail to the appellants. The Gujarat High court in the said judgment was dealing with entirely different situation and while addressing the question the learned Judge observed that Where the issue whether A was the tenant or whether A's family members jointly is an issue triable under section 70(b) of the Tenancy Act. In the present case this question did not arise since the certificate was not issued in the name of defendant no.1 alone but three separate certificates were issued in the name of defendant no.1, plaintiff and defendant no.2. The defendants never entered into the witness box or challenged the certificate issued in favour of his brothers in 1986. On all the issues the findings being concurrent and as I find sufficient material on record to sustain those findings they do not warrant interference by this court in extremely limited

jurisdiction of this court to disturb the findings of fact. The second appeal deserves to be dismissed with costs. Order accordingly.

(D.B.Bhosale, J.)